CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP. AND WILLIAMS & CO., INC., PETITIONERS,

vs.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1946.

CERTIORARI GRANTED DECEMBER 9, 1946.

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Defendants' Exhibit:

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* Indicates page of Exhibit Volume at which the exhibit is reproduced.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

Plaintiffs-Appellees,

against

149 MADISON AVENUE CORP. and WILLIAMS & Co., Inc.,

Defendants-Appellants.

Civil 23-461

Statement Under Rule XIII, Subdivision 4.

This action was commenced in the United States District Court for the Southern District of New York by the filing of a complaint on December 10, 1943. The summons and complaint were served on defendants on December 13, 1943. The answer was served on January 25, 1944. The amended answer was served on April 4, 1944. On November 22, 1944, during the trial the amended complaint was filed.

The defendants have not been arrested, nor was bail taken or property attached or arrested.

During the trial the action was discontinued as to George Anderson, who died pending the action. At the trial John H. Berger and George Berger were made parties plaintiff. By stipulation dated March 11, 1946, the action was discontinued on behalf of the plaintiffs Frank Asselta, Joseph McArdle and George Berger.

The action was tried before Judge William Bondy on November 16, 17, 20, 21, 22 and 24, 1944. No question was referred to a Commissioner or Commissioners, Master or Referee.

Judgment was entered on March 8, 1946, in favor of the plaintiffs Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra and John H. Berger.

By notice of appeal dated March 18, 1946, the defendants appeal from the judgment entered.

5 The plaintiffs appeared originally by Samuel D. Friedman as their attorney. By stipulation dated February 19, 1946, Duberstein & Nimkoff, Esqs., were substituted and now appear as plaintiffs' attorneys. The defendants are represented by Joseph Caine.

There has been no change of parties or attorneys since the commencement of the within action, except as set forth above.

6

Summons.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE ANDERSON, FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA,

Plaintiffs,

v.

149 MADISON AVENUE CORP. and WILLIAMS & CO., Inc.,

Defendants.

Civil-Action File No. 23-461

To the above named Defendants:

You are hereby summoned and required to serve upon Samuel D. Friedman, plaintiffs' atorney, whose address 305 Broadway, Borough of Manhattan, City of New York, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEORGE J. H. FOLLMER,
Clerk of Court.

Dated: Dec. 10, 1943.

[Seal of Court]

10 **Amended Complaint.**

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiffs by Samuel D. Friedman, their attorney as and for an amended complaint, complaining of the defendants, allege:

11 FOR A CAUSE OF ACTION IN FAVOR OF GEORGE ANDERSON.

FIRST: Plaintiffs bring this action to recover from defendants unpaid overtime compensation and an additional equal amount as liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 62 Stat. 1060), hereinafter referred to as the Act.

SECOND: Jurisdiction is conferred on this Court by Section 41 (8), 28 U.S.C. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," without regard to the citizenship of the parties
12 or the sum or value in controversy, and by Section 16 (b) of the Act. The Act has been in effect since October 24, 1938.

THIRD: At all times herein mentioned defendant 149 Madison Avenue Corp. has been a corporation organized under and existing by virtue of the laws of the State of New York, having its principal place of business at 149 Madison Avenue, in the City, County and State of New York, within the jurisdiction of this Court.

FOURTH: That at all times herein mentioned defendant Williams & Co., Inc., has been a corporation organ-

ized under and existing by virtue of the laws of the State of New York, having its principal place of business at 1178 Broadway in the City, County and State of New York, within the jurisdiction of this Court.

FIFTH: At all times herein mentioned defendant 149 Madison Avenue Corp. has been the owner of and in control of a 12 story and basement loft building located at 149 Madison Avenue, New York, N. Y.

SIXTH: At all times herein mentioned defendant Williams & Co., Inc., has acted as the agent of and for the account of the defendant 149 Madison Avenue Corp., in the management and operation of the building, has had authority to hire and fire employees engaged in the operation and maintenance of the building, and has issued instructions to and otherwise controlled, directed and supervised the employees in the performance of their duties; in so doing the agent, Williams & Co., Inc., has acted at all times in the interest of the defendant 149 Madison Avenue Corp., in relation to such employees.

SEVENTH: At all times herein mentioned space in the said building has been leased by defendants to and occupied by approximately 20 tenants, of which approximately 17 have been engaged in the production, sale and distribution of wearing apparel, laces, draperies, leather goods, carpets, rugs and magazines, approximately 2 have been engaged in the purchase, sale and distribution of ticking, upholstery and other materials and supplies at wholesale to manufacturers, wholesalers and contractors, and 1 has been engaged in the advertising business distributing advertising in newspapers throughout the States.

EIGHTH: At all times herein mentioned substantially all of the materials from which goods have been produced by tenants engaged in the production, sale and distribution of wearing apparel, laces, draperies, leather goods,

carpets, rugs and magazines have been purchased, transported and received in interstate commerce from points in various States other than the State of New York, and substantially all of the goods purchased, produced, sold or distributed by such tenants have been produced for interstate commerce and have been subsequent to the work performed upon them, sold, shipped, transported, distributed and delivered in interstate commerce from the building to points in various States other than the State of New York. At all times herein mentioned substantial quantities of ticking, upholstery and other materials, commodities and supplies distributed in the building by tenants engaged in the sale and distribution of such materials have been purchased, transported and received in interstate commerce from points in various states other than the State of New York, and substantial quantities of such goods have been sold, shipped, transported, distributed and delivered in interstate commerce in and from the building to points in various states other than the State of New York. With few exceptions, substantially all of the tenants in the building have thus been regularly and continuously engaged there in trade, commerce and transportation between the several states of the United States and in the production of goods for distribution among the several states of the United States.

NINTH: At all times herein mentioned a substantial number of tenants in the building have been regularly and continuously engaged there in the use of the mails, telephone, telegraph and other instrumentalities of interstate commerce to communicate between offices in the building and various points outside of the State of New York. A substantial number of tenants have thus regularly and continuously engaged in the building in interstate transmission and communication.

TENTH: Since October 24, 1938, defendants have employed an average of approximately 10 employees, including plaintiffs, as building maintenance and operating employees, in such capacities as elevator operators, watchmen, engineers, firemen, mechanics, electricians, porters and handymen in the maintenance and operation of the building and of the facilities of the building. These employees have at all times performed the customary duties of persons charged with the effective maintenance of a loft and manufacturing building, including the furnishing of heat and hot water; the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as raw materials and other goods coming to and finished garments and other products going from tenant's premises; protection of the building and tenant's quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; and the keeping of the building and tenant's quarters in a clean and habitable condition. 20

ELEVENTH: In performing their duties the said employees, including plaintiffs, have been engaged in operations, processes and duties closely, immediately, and essentially related to interstate commerce, trade, transportation, transmission and communication carried on in the building by the various tenants, and in occupations and processes necessary to the preparation, handling, distributing and production for interstate commerce of various goods, articles and materials and commodities by the tenants in the building. 21

TWELFTH: Between October 24, 1938, and the present date, defendants employed plaintiffs as building maintenance and operating employees, engaged in inter-

state commerce, and during the period between October 24, 1938, and the present date defendants have employed various other building maintenance and operating employees similarly situated to plaintiffs in interstate commerce and in the production of goods for interstate commerce, for work weeks longer than the applicable maximum number of weeks prevailing under Section 7 of the Act (44 hours per week between October 24, 1938, and October 24, 1939; 42 hours per week between October 24, 1939, and October 24, 1940; and 40 hours per week subsequent to October 24, 1940) and defendants failed and refused to compensate plaintiffs and such other employees for such employment in excess of the applicable maximum in such work weeks at rates not less than one and one-half times the regular rates at which they have been employed. The employment of plaintiffs for work weeks in excess of the applicable maximum prevailing under Section 7 of the Act without compensating them for such excess at rates not less than one and one-half times the regular rates at which they have been employed was in violation of Section 7 of the Act.

THIRTEENTH: Between October 24, 1938, and the present date defendants employed plaintiff, George Anderson, as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act, That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

FOURTEENTH: That plaintiff George Anderson made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who, upon investigation, computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $188.08. Payment of this sum was subsequently made but these defendants have failed and refused to pay the liquidated damages in an equal amount of $188.08 pursuant to said Act and in violation thereof. That said plaintiff was damaged thereby in the sum of $188.08, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF FRANK ASSELTA

FIFTEENTH: Plaintiff Frant Asselta, repeats and realleges paragraphs First to Twelth, inclusive, with the same force and effect as though incorporated herein.

SIXTEENTH: Between October 24, 1938, and the present date defendants employed plaintiff Frank Asselta as a watchman and elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

SEVENTEENTH: That plaintiff Frank Asselta made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who, upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $465.29. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in an equal amount of $465.29 pursuant to said Act and in violation thereof. That said plaintiff was damaged thereby in the sum of $465.29, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF CAMILO DEL RIO

EIGHTEENTH: Plaintiff Camilo Del Rio repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

NINETEENTH: Between October 24, 1938, and the present date defendants employed plaintiff Camilo Del Rio as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

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TWENTIETH: That plaintiff Camilo Del Rio made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 who, upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating April 20, 1942, as $211.35. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in additional equal amount of $211.35 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $211.35, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

32

FOR A CAUSE OF ACTION IN FAVOR OF JOSEPH MCARDLE

TWENTY-ONE: Plaintiff Joseph McArdle repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

33

TWENTY-TWO: Between October 24, 1938, and the present date defendants employed plaintiff Joseph McArdle as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

34 TWENTY-THREE: That plaintiff Joseph McArdle made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who, upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, at $151.39. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in an additional equal amount of $151.39 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $151.39, and, in addition thereto, to the 35 extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF SAMUEL MANNE

TWENTY-FOUR: Plaintiff Samuel Manne repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

36 TWENTY-FIVE: Between October 24, 1938, and the present date defendants employed plaintiff Samuel Manne as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

TWENTY-SIX: That plaintiff Samuel Manne made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 who upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating April 20, 1942, as $197.98. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in an additional equal amount of $197.98 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $197.98, and, in addition thereto, to the extent 38
of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF CORNELIUS MCCOLE

TWENTY-SEVEN: Plaintiff Cornelius McCole repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

TWENTY-EIGHT: Between October 24, 1938, and the 39
present date defendants employed Cornelius McCole, plaintiff, as a watchman, elevator operator and porter and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

40 TWENTY-NINE: That plaintiff Cornelius McCole made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 who upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $234.99. Payment of this sum was subsequently made but the defendants have failed and refused to pay the liquidated damages in an additional equal amount of $234.99 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $234.99, and, in addition
41 thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF BURTON PETERSON

THIRTY: Plaintiff Burton Peterson repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

42 THIRTY-ONE: Between October 24, 1938, and the present date defendants employed plaintiff Burton Peterson as an elevator operator and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

THIRTY-TWO: That plaintiff Burton Peterson made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938 who upon investigation computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $203.80. Payment of this sum was subsequently made but defendants have failed and refused to pay the liquidated damages in an additional equal amount of $203.80 pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $203.80, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16(b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF FRANK RODRIGUEZ

THIRTY-THREE: Plaintiff Frank Rodrigues repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

THIRTY-FOUR: Between October 24, 1938, and the present date defendants employed plaintiff Frank Rodriguez as a fireman and as such employee he was engaged in interstate commerce and in the production of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during the said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

46 THIRTY-FIVE: That plaintiff Frank Rodriguez made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who upon investigation, computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $78.43. Payment of this sum was subsequently made, but the defendants have failed and refused to pay the liquidated damages in an additional equal amount of $78.43 pursuant to said Act and in violation thereof. That he was damaged
47 thereby in the sum of $78.43, and, in addition thereto, to the extent of such sums which have become due and payable under both Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

FOR A CAUSE OF ACTION IN FAVOR OF JAMES TORRA

THIRTY-SIX: Plaintiff James Torra repeats and realleges paragraphs First to Twelfth, inclusive, with the same force and effect as though fully incorporated herein.

48 THIRTY-SEVEN: Between October 24, 1938, and the present date defendants employed plaintiff James Torra as a handyman, elevator operator and repairman and as such employee he was engaged in interstate commerce and in the productions of goods for interstate commerce, for work weeks in excess of the hours of the applicable maximum hours established by Section 7 of the Act without being compensated for such excess at rates not less than one and one-half times the regular rate at which he was employed by the defendants during said period, which was in violation of Section 7 of the Act. That these defendants failed and refused to compensate said plaintiff for said excess hours established by said Act.

THIRTY-EIGHT: That plaintiff James Torra made complaint to the Wage and Hour Division under the provisions of the Fair Labor Standards Act of 1938, who upon investigation, computed the amount of unpaid overtime compensation to which he was entitled for the period terminating on April 20, 1942, as $249.31. Payment of this sum was subsequently made, but the defendants have failed and refused to pay the liquidated damages in an additional equal amount of $249.31, pursuant to said Act and in violation thereof. That he was damaged thereby in the sum of $249.31, and, in addition thereto, 50
to the extent of such sums which have become due and payable under both Sections 7 and 16(b) of the Fair Labor Standards Act of 1938 between the time covered by the computation made by the Wage and Hour Division and the service of the complaint.

WHEREFORE, plaintiffs pray that judgment be awarded them for liquidated damages as follows:

GEORGE ANDERSON	$188.08
FRANK ASSELTA	465.29
CAMILO DEL RIO	211.35
JOSEPH MCARDLE	151.39
SAMUEL MANNE	197.98
CORNELIUS MCCOLE	234.99
BURTON PETERSON	203.80
FRANK RODRIGUEZ	78.43
JAMES TORRA	249.31

51

and plaintiffs further pray that the Court allow a judgment for such additional amounts as are due to each of them under Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938 since the period covered by the computation of the Wage and Hour Division, together

52 with reasonable attorney's fees and the costs and disbursements of this action.

SAMUEL D. FRIEDMAN
Attorney for Plaintiffs
Office and P. O. Address
305 Broadway
Borough of Manhattan
City of New York

NOTE: During the trial this complaint was amended
53 to include causes of action on behalf of John H. Berger and George Berger.

54

Amended Answer.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendants, by Joseph Caine, their attorney, for their amended answer to the complaint, allege:

ANSWERING THE CAUSE OF ACTION OF GEORGE ANDERSON:

1. Admit the allegations contained in paragraph numbered "Fifth" of the complaint, excepting that the defendants deny that the building located at 149 Madison Avenue, New York City, is a loft building.

2. Deny any knowledge or information sufficient to form any belief as to the allegations contained in paragraph numbered "Seventh" of the complaint, excepting that the defendants admit that they leased space to certain tenants in said building.

3. Deny any knowledge or information sufficient to form any belief as to the allegations contained in paragraphs numbered "Eighth" and "Ninth" of the complaint.

4. Deny each and every allegation contained in paragraph numbered "Tenth" of the complaint, excepting that the defendants admit the employment of the plaintiffs in the several capacities of building service and maintenance employees and excepting further that the defendants admit that each of the plaintiff was engaged in the customary duties of the work for which he was hired.

5. Deny each and every allegation contained in paragraphs numbered "Eleventh," "Twelfth," "Thirteenth"

and "Fourteenth" of the complaint, excepting that the defendants admit payment to the plaintiff of the sum of $188.08.

ANSWERING THE CAUSE OF ACTION OF FRANK ASSELTA:

6. Deny each and every allegation contained in paragraph numbered "Sixteenth" of the complaint, excepting that it is admitted that the plaintiff, Asselta, was employed by the defendants as an elevator operator and watchman.

7. Deny each and every allegation contained in paragraph numbered "Seventeenth" of the complaint, excepting that the defendants admit the payment to the plaintiff of the sum of $455.29.

ANSWERING THE CAUSE OF ACTION OF CAMILO DEL RIO:

8. Deny each and every allegation contained in paragraphs numbered "Nineteenth" and "Twentieth" of the complaint, excepting that defendants admit the employment of the plaintiff, Del Rio, as an elevator operator and the payment to him of $211.35.

ANSWERING THE CAUSE OF ACTION OF JOSEPH MCARDLE:

9. Deny each and every allegation contained in paragraphs numbered "Twenty-Second" and "Twenty-Third" of the complaint, excepting that the defendants admit the employment of the plaintiff, McArdle, as an elevator operator and that he was paid the sum of $139.00.

ANSWERING THE CAUSE OF ACTION OF SAMUEL MANNE:

10. Deny each and every allegation contained in paragraphs numbered "Twenty-Fifth" and "Twenty-Sixth"

of the complaint, excepting that the defendants admit the employment of plaintiff, Manne, as an elevator operator and the payment to him of $197.98.

ANSWERING THE CAUSE OF ACTION OF CORNELIUS MCCOLE:

11. Deny each and every allegation contained in paragraphs numbered "Twenty-Eighth" and "Twenty-Ninth" of the complaint, excepting that the defendants admit the employment of McCole at different times during the period complained of as a watchman, elevator operator or 62
porter and that he received $234.99 from the defendants.

ANSWERING THE CAUSE OF ACTION OF BURTON PETERSON:

12. Deny each and every allegation contained in paragraphs numbered "Thirty-First" and "Thirty-Second" of the complaint, excepting that the defendants admit the employment of the plaintiff as an elevator operator and that he was paid $203.80.

ANSWERING THE CAUSE OF ACTION OF FRANK RODRIGUEZ:

13. Deny each and every allegation contained in para- 63
graphs numbered "Thirty-Fourth" and "Thirty-Fifth" of the complaint, excepting that it is admitted that defendants employed plaintiff, Rodriguez, as a fireman and that he was paid the sum of $78.43.

ANSWERING THE CAUSE OF ACTION OF JAMES TORRA:

14. Deny each and every allegation contained in paragraphs numbered "Thirty-Seventh" and "Thirty-Eighth" of the complaint, excepting that it is admitted that Torra worked for the defendants as a part time elevator man and part time repairman and that he was paid the sum of $249.31.

64 *Amended Answer*

FOR A FIRST SEPARATE AND DISTINCT DEFENSE AND AS A SET-OFF, DEFENDANTS ALLEGE:

15. That on or about October 8th, 1942, the defendants voluntarily paid to each of the plaintiffs the amounts admitted in their respective causes of action.

16. That such payment constituted payment in full for all overtime hours worked by the plaintiff during the period of time complained of.

65 17. That such payment followed a computation of the total number of hours worked by each of the plaintiffs in excess of the statutory maximum and for which they might be entitled to claim overtime compensation; that at the time such payment was made, there was a genuine dispute between the parties regarding the facts surrounding the employment by the defendants of the plaintiffs, more particularly, regarding the number of tenants, if any, in the premises which were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act; regarding the proportion of such tenants compared to all of the tenants in the building; regarding the proportion of space occupied by such
66 tenants as compared with the proportion of those tenants who were not engaged in any production whatsoever; regarding the activities of each of the tenants; regarding the activities of the plaintiffs themselves in relation to the tenants and whether such activities were or were not closely connected with the production of goods in said premises, or a part thereof.

18. That because of the existence of such genuine disputes between the parties, they agreed to and did settle and compromise their differences, negotiating at arm's length without mistake, fraud, misrepresentation or overreaching on the part of anyone against the other, and that following such accord, the claims of the plaintiffs were

satisfied by payment to each plaintiff of the full amount found due him as overtime compensation, and that such amounts were paid to each of the plaintiffs by the defendants and received by each of the plaintiffs in full satisfaction of the entire claim of each of the plaintiffs for overtime compensation, and other claims of whatever nature, from the defendants; that in evidence of the settlement, each of the plaintiffs executed and delivered to the defendants, releases and that accordingly, such accord and satisfaction and releases given in each instance are a complete bar to any recovery by the plaintiffs herein.

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FOR A SECOND SEPARATE AND DISTINCT DEFENSE, DEFENDANTS ALLEGE:

19. That the plaintiffs' activities or employment in behalf of the defendants at their premises, 149 Madison Avenue, New York City, was neither actually in intertsate commerce or so closely related to the movement of goods in interstate commerce as to be part of it and that, accordingly, each of the plaintiffs herein comes outside of the protection and coverage of the Act and is not entitled to recover thereupon.

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FOR A THIRD SEPARATE AND DISTINCT DEFENSE, DEFENDANTS ALLEGE:

20. That the claim of each of the plaintiffs for liquidated damages made more than a year after the payment of the overtime compensation claim of each of them is made unreasonably and unduly late and that the laches of each of the plaintiffs in making such claim should bar them from recovery herein, the defendants having irretrievably and irreparably changed their position to their damage by reason of such payments and by reason of the plaintiffs' present claims.

70 *Amended Answer*

FOR A FOURTH SEPARATE AND DISTINCT DEFENSE, DEFENDANTS ALLEGE:

21. That the plaintiffs, having accepted the full amount of overtime due them more than a year prior to the commencement of this action for liquidated damages, and having accepted such amounts prior to the commencement of action therefor, are and should be estopped from any and all claims for liquidated damages by reason of their failure to assert such claim at the time of the payment of
71 overtime to them and by reason of their delay and neglect in making such claims for more than one year after payment to them of the overtime compensation.

WHEREFORE, defendants pray for judgment dismissing the complaints of each of the plaintiffs herein, together with the costs and disbursements of the action.

JOSEPH CAINE
Attorney for Defendants
Office & P. O. Address
1178 Broadway
Borough of Manhattan
City of New York

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Testimony.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Before: Hon. William Bondy, District Judge.

New York, November 16, 1944, 10:30 A. M.

Appearances:

Samuel D. Friedman, Esq., Attorney for Plaintiffs; Frederick E. Weinberg, Esq., of Counsel.

Joseph Caine, Esq., Attorney for Defendants; Joseph Caine, Esq., and Moses M. Cohen, Esq., of Counsel.

Motion to Amend Complaint.

Mr. Weinberg: Your Honor, I have a motion with respect to the complaint. Shall I make it now?

The Court: I will know more about it after I read the pleadings.

Mr. Weinberg: All right, sir, certainly.

The Court: Are all the allegations in the separate causes of action the same?

Mr. Weinberg: Yes, they are the same. They are repeated.

The Court: I needn't read them. They are the same?

Mr. Weinberg: They are identical.

The Court: Now I am prepared to hear you.

Mr. Weinberg: May it please the Court, the plaintiffs move at this time to amend. I desire to amend the complaint in two respects, your Honor. The first proposed amendment is to add two new employees as plaintiffs. The names of the employees to be added and included therein

are John H. Berger and George Berger. They are respective superintendents and repairmen—or rather each one is engaged both as superintendent and repairman.

The Court: What are their names?

Mr. Weinberg: John H. Berger and George Berger. They are both engaged in duties which include that of superintendent and repair work on the premises.

The Court: Both the same?

Mr. Weinberg: Yes, each of them includes both.

The Court: Are they related?

Mr. Weinberg: They are brothers. Each of them includes duties both as superintendent and repairman and handyman. The amounts for which they are suing are not the same for reasons that my next proposed amendment will exhibit.

My next amendment to the complaint—and in order that it may be intelligible, I will have to consider for a moment the complaint as it now stands. The complaint seeks recovery for moneys due down to the date of the service of the complaint itself. It seeks it for that period with respect to each of the plaintiff employees. Nevertheless in each of the causes of action as the complaint now stands, there is an admission to the effect that the extra time and a half for overtime hours rendered due under Section 7 of the Fair Labor Standards Act of 1938, was paid to each of the plaintiffs on October 8, 1942, or thereabouts, so that the only amounts still due would be the liquidated damages provisions or amounts under Section 16(b) of the Act.

On December 6th the Supreme Court of the United States in the case of Walling v. Helmerich & Payne, rendered a decision upon the basis of which we believe that the amounts paid to each of the plaintiffs since October 8, 1942, were not a proper discharge of the duties of these defendants under Section 7 of the Act.

The Court: Well, why not? In other words, it was less. How was the money computed?

Mr. Weinberg: The money was computed—of course I am anticipating the evidence but I will state it, your Honor —the money was computed by a fictitious device used to compute the regular hourly rate in such a manner that no additional payments would be made.

The Court: I know what you mean.

Mr. Weinberg: Now in view of that case and in view of the fact that we are not extending the period for which we ask money but merely complaining that what we had thought to have been fully paid under Section 7 we realize now under the recent decision was not fully paid; that by a trick the obligation was evaded; and I wish to amend the complaint so as to include additional amounts under Section 7 as well as under 16(b), and also in the respect that the period should be—which I understand this Court allows—extended down to the date of the trial.

The Court: Are they still working?

Mr. Weinberg: Yes, your Honor.

Mr. Cohen: If your Honor please, as regards the first amendment, I have no objection excepting that these—

The Court: Just let me ask a question. Do you oppose the amendment?

Mr. Cohen: I do not oppose it excepting for this condition which exists: there is now pending in the Municipal Court of the City of New York in one of the District Courts, two separate actions by these two individuals which set forth these particular causes of action. Now, I would say in the ordinary and regular course of litigation those two actions should have been discontinued and permission to come into this Court granted.

The Court: Are you willing to discontinue the others?

Mr. Weinberg: Certainly, your Honor. That will of course be done.

The Court: Is that the only objection?

Mr. Cohen: That is the only objection.

Mr. Weinberg: That will be done immediately.

The Court: Yes, on the condition that those two Municipal Court actions will be discontinued, then with the consent of the defendant the amendment is allowed.

Mr. Weinberg: I assume the discontinuance will be without costs, and it will be done immediately.

The Court: Have you got an amended complaint there as to these causes of action?

Mr. Weinberg: No. I will have one prepared in the office, but I might anticipate by saying that the cause of action for each man is a facsimile of the other, and it will be identical with those presently in the complaint. I assume the same answer and the same defenses will be made to those two.

The Court: Now, you move—

Mr. Cohen: I move the same defenses be permitted.

The Court: —the same defenses shall apply to these two new causes of action.

Mr. Weinberg: Of course.

Mr. Cohen: With respect to the second proposed amendment to the complaint, I have to urge seriously, your Honor, that I cannot possibly be ready to undertake a defense which is urged upon me or forced upon me rather to do for the first time following a decision of the Supreme Court that occurred or came down only last week which brings into this case issues that are entirely new. The issue that your Honor will have to determine in passing on this new question is whether or not a certain so-called Meyer agreement between the representatives of the employer, the Realty Advisory Board, and representatives of the plaintiffs, the union, Local 32(b)—whether that agreement is of sufficient strength and propriety to overcome the provisions of the Act or to meet, rather, the provisions of the Act.

The Court: Isn't it true that under the Act or the de-

cisions under it, the amount due an employee in any possible way?

Mr. Cohen: No, Judge; that is not the question. The question is not whether we have paid them the amounts fully including liquidated damages. The question here is that after April 2nd or 15th of 1942 there was an agreement entered into between the parties hereto by their union and representatives of the employer—

The Court: Properly entered into.

Mr. Cohen: —properly entered into under the negotiations of the Mayor, I believe, of the City of New York.

The Court: And the question is, what is the legal effect?

Mr. Cohen: The question is whether a formula was entered into or arrived at by those contracting parties which adequately met the requirements of the Act so that these employees could be paid at so much per hour for 40 hours, and so much thereafter for the six hours beyond forty that they still had to work.

* * * * * *

Mr. Weinberg: Suppose we try the case for the cause of action simply bringing it down to the date of the service of the complaint and on Monday I furnish your Honor with a memorandum of your power to bring it down further. At the moment I will be limited to the date of the service of the complaint subject to the authority then to be furnished, so there is no question about that.

The Court: I think I will take the case, I will hear the evidence and determine this question of amendment as we go along.

Mr. Weinberg: 10:30 Monday, your Honor.

The Court: 10:30, yes. In other words, I will reserve my decision on that, and on the opposition to it till I hear the case. I think the case can be prepared and the workmen ought to get what under the law they are entitled to and their employer ought to be willing to pay

88 *Motion to Amend Complaint*

them what they are entitled to. If they are not entitled to anything the employer should not be required to pay them anything. If they are entitled to more, the employer should pay it.

* * * * * *

New York, November 20, 1944;
10:30 o'clock A. M.

89 Trial resumed.

Appearances:

Samuel D. Friedman, Esq., Attorney for Plaintiff; Frederick E. Weinberg, Esq., of Counsel.

Joseph Caine, Esq., Attorney for Defendant, 149 Madison Avenue Corporation; Moses M. Cohen, Esq., of Counsel.

McLanahan, Merritt & Ingraham, Esqrs., Attorneys for Defendant Williams & Co., Inc.; Robert R. Bruce, Esq., of Counsel.

90 Mr. Weinberg: Shall I put my first witness on the stand?

The Court: No; weren't there some motions to amend?

Mr. Weinberg: Oh, I see. Then I will restate my motion to conform—

The Court: Why do you want to restate it?

Mr. Weinberg: I want to limit the scope of time of the motion to bring it down to the service of the complaint in order to avoid a difficulty.

The Court: Can't be any question that you can't go beyond that.

Mr. Weinberg: I will confine my motion to that ambit, Judge.

The Court: Make your motion. You withdraw all the other motions?

Mr. Weinberg: Yes, I will withdraw to keep the record clear.

The Court: You are withdrawing all motions.

Mr. Weinberg: The motion is to amend paragraph 14th of the complaint and the corresponding paragraphs in each of the successive causes of action on behalf of the other plaintiffs to delete therefrom so much of the allegations as imply a complete payment under Section 7 of the Act so as to be relieved of the admission of a complete payment so that the plaintiffs severally are suing for what is due them under Section 7 between the date covered by the payments referred to in the preceding paragraphs and the date of the service of the complaint. In other words, to have paragraph 14th and its parallel paragraphs would be seeking recovery both under Section 7 and under 16(b). Since those paragraphs are followed by admissions of complete payments under Section 7 and since the Supreme Court has recently indicated that it was not a complete payment I want to sue under Section 7, too.

Mr. Weinberg: I refer your Honor to paragraph 13th of the complaint. May I speak with reference to that while that is in front of you, Judge? 93

The Court: Tell me exactly what you want. I asked you to let me have in writing the amendment that you proposed.

Mr. Weinberg: Well, since I will do it may I state again on the record and if your Honor requires it I can have it written into the record, but I will state it very precisely.

Paragraphs 13th, 16th, 19th, 22nd, 25th, 28th, 31st, 34th and 37th—

The Court: Those are the similar allegations to 13th and 14th?

Mr. Weinberg: Well, those are the ones that are similar to 13th. As to each of those, if your Honor please, I will say it precisely and very shortly. Each of those paragraphs demand judgment—

Mr. Weinberg: Then I want to amend the ones that follow; I want to amend 14th—

The Court: You are not moving to amend 13?

Mr. Weinberg: No; those are the ones I was referring to in my argument. I don't want to amend those. I want to amend 14th, 17th, 20th, 23rd, 26th, 29th, 32nd, 35th and 38th, and I am reading from a notice served on Friday upon the attorneys for the defendants by transforming the period at the end of each of those paragraphs—by changing the periods at the end of each of those paragraphs and by putting commas in and inserting after each such comma in each such paragraph the following language, to wit: "and in addition thereto to the extent of such sums which have become due and payable under both Sections 7 and 16(b) of the Fair Labor Standards Act of 1938 between the end of the period covered by the aforesaid payment made with the Wage and Hour Division and the service of the complaint in this action."

The Court: Is there any objection to that amendment?

Mr. Cohen: Yes, your Honor, considerable. At the outset Mr. Weinberg stated that he wanted to withdraw the amendment as he proposed it last week.

The Court: I understand all amendments, all motions were withdrawn.

Mr. Cohen: That is right.

The Court: And the only motion before the Court now is the motion to amend in the manner stated.

Mr. Cohen: Now he is asking for the very same thing which he said he had been withdrawing. He has not changed the amendment in any effect. In fact, it is the

very same amendment that he urged from the beginning. It is even more extensive than the amendment that he urged in the beginning because he now compels us for the first time to defend against a claim for further overtime beside the original claim for liquidated damages. In other words when he originally framed his issues he asked simply for liquidated damages conceding that he got his full overtime by the payments that were made from October, 1938, until April 20, 1942. By this amendment now he seeks to go back to ask for further overtime for that period which he already conceded he got his overtime for and come forward from the 98
period of the release to the present date and ask for both liquidated damages and overtime.

That brings us back to the same point we started at the beginning of this argument. We are not prepared to litigate the question of anything due whether it is liquidated damages or overtime for the period after the release. That will require the interpretation of new contracts, it will require bringing in all these questions which we stated at the beginning we could not prepare properly for, which we thought we should bring counsel in on behalf of the Realty Advisory Board, and I am advised this morning such counsel is here with a request 99
of their own on this particular matter and possibly if your Honor is minded to continue—

* * * * * *

Mr. Bruce: My name is Robert R. Bruce. I have been retained by Mr. Caine to oppose this motion. I am speaking with Mr. Cohen's and Mr. Caine's permission representing both defendants. I am retained to try part of this action in the event your Honor amends the complaint.

* * * * * *

The Court: On all that has been disputed and argued up to date I am now saying that my position is this: I

will allow the plaintiff to amend his complaint so that it shall permit him to recover, as he is willing to do, so that he shall be limited to the $188 in the first cause of action which was found by the Division, and I will allow him to prove whether he is entitled to overtime on the basis of that $188 up to—what date was it?

Mr. Bruce: December 10, 1943.

Mr. Weinberg: No, your Honor means first the prior period?

The Court: Yes. $188 up to what date?

Mr. Weinberg: April 20, 1942.

The Court: For wages earned up to April 20, 1942. And I will permit the complaint to be amended so that he can prove what the regular wages were and his overtime and his liquidated damages between that date and the date of the filing of the complaint.

Mr. Weinberg: All right, your Honor.

Mr. Bruce: May I be heard on that?

The Court: The defense has exceptions. I have heard enough.

Mr. Bruce: There is one point I haven't had an opportunity to go into.

The Court: And I will allow the prayer for damages to be amended accordingly. I will allow similar amendments as to each cause of action.

Mr. Weinberg: I overlooked stating to your Honor that the motion to include the two new plaintiffs, John H. Berger and George Berger is renewed. I am afraid that by mistake I withdrew that motion.

The Court: That was consented to.

Mr. Bruce: It has been consented to but only to the extent that they are permitted to join this action and to recover in this action up to April 20, 1942. It is not consented in this subsequent period.

The Court: Yes.

Motion to Amend Amended Answer 103

The Court: It will be understood that every conceivable defense made to the complaint has been interposed.

Mr. Weinberg: I so stipulate.

The Court: He so stipulates.

Mr. Weinberg: I will plead surprise to nothing.

Mr. Bruce: Well, may we have an opportunity to file a written answer and to make certain motions on the basis of those defenses?

The Court: If you want at any time to limit the generality of that stipulation you may do it by limitation and putting up specific defenses. He is giving you every defense. 104

Mr. Weinberg: Every conceivable defense as the trial goes on.

* * * * * *

Mr. Bruce: I want to take exception first to your Honor's ruling and I want to state the exception.

* * * * * *

Motion to Amend Amended Answer.

Mr. Bruce: I am about to make a motion, your Honor.

The Court: Make your motion. Tell me what it is and I will rule. 105

Mr. Bruce: I haven't anything to move on yet. I want to offer a defense to this new claim as the basis for the motion.

The Court: You want to amend your answer?

Mr. Bruce: Yes, your Honor, we want to amend the answer to plead—

The Court: To state.

Mr. Bruce: To plead the National War Labor Board agreement which I handed your Honor this morning. In substance, we wish to allege that the plaintiffs were members of Local 32-B Building Service Employees International Union throughout the entire period of their employ-

106 *Offering of Exhibits*

ment by the defendant; that on or about September 1st, 1942, that there was entered into between Local 32-B, the union to which these plaintiffs belong, on behalf of all of its members including these plaintiffs, and the Realty Advisory Board on Labor Relations, Inc., on behalf of certain signatory buildings of which the defendant's building was one, a collective bargaining agreement known as the National War Labor Board Agreement; that such agreement was effective by its terms covering the period April 21, 1942, to April 20, 1945; that said agreement is binding on the plaintiffs and on the de-
107 fendants; that the plaintiffs have been paid in full and in strict accordance with that agreement.

* * * * * *

Amended Complaint Filed

New York, November 22, 1944;
10:30 o'clock A. M.

Trial resumed.

* * * * * *

Mr. Weinberg: If your Honor please, defendants'
108 counsel asked me to serve him with a copy of the amended complaint and in order that the record may be clear I want to mark the complaint as amended as an exhibit, or at least hand it up to your Honor.

The Court: That is the complaint as amended?

Mr. Weinberg: As amended, your Honor.

* * * * * *

Offering of Exhibits

Mr. Weinberg: If your Honor please, in view of the discussion about the union agreement, I think it ought to be placed in evidence.

* * * * * *

Offering of Exhibits 109

Mr. Weinberg: I would like to offer it. There is no objection, I understand.

The Court: If there is no objection, I will take it.

(Same marked Plaintiffs' Exhibit 1.)

* * * * * *

Mr. Weinberg: I offer in evidence a stipulation between the attorneys subject to the completion of column 5. I am offering in evidence a stipulation executed between the attorneys subject to the fact that column 5 in paragraphs 5 and 7 has not been filled in and will be filled in before the completion of the entire case, but I am offering the balance of it signed and executed between the attorneys. There will also be added to the stipulation the pay roll referred to in paragraph 10. 110

* * * * * *

Mr. Weinberg: I now offer in evidence, if your Honor pleases, the Sloan agreement referred to in the stipulation.

(Stipulation marked Plaintiffs' Exhibit 2 in evidence.)

(Sloan agreement marked Plaintiffs' Exhibit 3 in evidence.)

Mr. Weinberg: I now offer in evidence the National War Labor Board's directive order and report and recommendations of the Mediation Panel. 111

(Same marked Plaintiffs' Exhibit 4 in evidence.)

* * * * * *

Mr. Weinberg: May I ask for the records pursuant to stipulation that was read in court this morning showing the weekly computation of the work weeks and the payments made to the plaintiffs for the period from October 24, 1938, through April 20, 1942?

* * * * * *

The Court: All he promises to produce is the computation sheets for additional wages of the plaintiffs.

* * * * * *

112 *Offering of Exhibits*

Mr. Weinberg: May I ask that they be marked for identification?

The Court: Mark them for identification.

* * * * * *

(Papers marked Plaintiffs' Exhibit 5 for identification.)

* * * * * *

Mr. Weinberg: I now offer them in evidence, your Honor.

The Court: All right, put them in evidence.

113 (Plaintiffs' Exhibit 5 for identification received in evidence.)

* * * * * *

New York, November 24, 1944, 10:30 A. M.

Trial resumed.

Mr. Weinberg: I call upon defendants' counsel to produce the weekly pay roll records covering these plaintiffs and their payments for the period between April

114 20, 1942, and December 10, 1943.

* * * * * *

Mr. Weinberg: If counsel will let me, I will mark them in evidence now.

* * * * * *

Mr. Bruce: No objection.

* * * * * *

The Clerk: It will take too long to mark them individually. May I just mark them as one exhibit and then mark any that is referred to separately?

The Court: Yes.

(Marked Plaintiffs' Exhibit 6, consisting of 91 sheets.)

* * * * * *

Stipulation re Exhibits. 115

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Plaintiffs-Appellees,
against 116
149 MADISON AVENUE CORP. and WILLIAMS & Co., Inc.,
Defendants-Appellants.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the plaintiffs' exhibits numbered 1, 3, 4, 5 and 6 shall be omitted from the transcript of record on appeal, but shall be deemed to be included as part of the record on appeal with the same force and effect as if set forth in full in said transcript of record on appeal and that three copies of each exhibit specified above shall be 117 handed up to the Circuit Court of Appeals.

Dated: New York, N. Y., April 2, 1946.

DUBERSTEIN & NIMKOFF
Attorneys for Plaintiffs-Appellees.
JOSEPH CAINE
Attorney for Defendants-Appellants

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Plaintiffs' Exhibit 1.

National War Labor Board Agreement.

(Omitted pursuant to stipulation.)

Plaintiffs' Exhibit 2.

DISTRICT COURT OF THE UNITED STATES,

119 FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE ANDERSON, FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ and JAMES TORRA,

Plaintiffs,

against

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

Defendants.

} Stipulation of Facts

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IT IS STIPULATED AND AGREED by and between the attorneys for the respective parties as follows:

1. That the plaintiffs, George Anderson, Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, and James Torra for the period April 21, 1942 to December 10, 1943, were employed and paid in accordance with the terms and conditions of employment provided in a collective bargaining agreement known as the National War Labor Board Agreement.

Plaintiffs' Exhibit 2

2. That the said plaintiffs enumerated in pargraph 1, while employed at 149 Madison Avenue, have been at all times members of Local 32-B, Building Service Employees International Union. 121

3. That for the period April 21, 1942 to date, the defendant 149 Madison Avenue Corp. has been a party to, and the building involved in this action 149 Madison Avenue, New York, N. Y., has been a signatory building under said National War Labor Board Agreement, as a Class C loft building.

4. The periods of employment of the respective plaintiffs at 149 Madison Avenue were as follows: 122

Plaintiff's Name	Periods of Employment
George Anderson	10/24/38-12/10/43
Frank Asselta	10/24/38-4/5/42
Camilo Del Rio	10/24/38-12/10/43
Joseph McArdle	10/24/38-9/27/40
Samuel Manne	10/24/38-12/10/43
Cornelius McCole	4/5/40-12/10/43
Burton Peterson	10/24/38-8/7/43
Frank Rodriguez	7/26/41-1/25/43
James Torra	10/24/38-12/10/43
John H. Berger	8/24/40-12/10/43
George Berger	8/19/39-8/29/40

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5. That the said plaintiffs enumerated in paragraph 1 were employed and actually worked pursuant to the terms of said National War Labor Board Agreement during the periods specified below on the following basis:

124 *Plaintiffs' Exhibit 2*

(1) Plaintiff's Name	(2) Period	(3) Total Hours Regularly Employed Per Week	(4) Weekly Wages or Earnings	(5)* Number of Regular Work Weeks in Period*
Anderson	4/21/42-8/8/42	47	27.50	15
	8/10/42-4/20/43	46	27.50	27
	4/24/43-12/10/43	46	28.90	30
125 Del Rio	4/21/42-8/8/42	47	27.50	14
	8/10/42-4/20/43	46	27.50	31
	4/21/43-12/10/43	46	28.90	30
Manne	4/21/42-8/8/42	47	27.50	16
	8/10/42-4/20/43	46	27.50	33
	4/21/43-12/10/43	46	28.90	33
McCole	4/21/42-6/13/42	60	27.50	8
	6/15/42-8/8/42	59	27.50	8
	8/10/42-4/20/43	54	27.50	35
	4/21/43-12/10/43	54	28.90	34
Peterson	4/21/42-8/8/42	47	27.50	14
126	8/10/42-4/20/43	46	27.50	32
	4/21/43-8/7/43	46	28.90	11
Torra	4/21/42-8/8/42	47	30.50	15
	8/10/42-4/20/43	46	30.50	35
	4/21/43-12/10/43	46	31.90	33

6. That the plaintiffs enumerated in paragraph 1, if employed during the period April 24, 1939 to April 20, 1942, were employed pursuant to a collective bargaining agreement known as the Sloan Agreement.

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

Plaintiffs' Exhibit 2

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7. That the plaintiffs, J. H. Berger and Frank Rodriguez, for the period of their employment subsequent to April 21, 1942, were employed and actually worked on the basis of the following regular work weeks and weekly wages, and they agreed with their employer that their hourly rates for said employment would be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of 40 hours:

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(1) Plaintiff's Name	(2) Period	(3) Total Hours Regularly Employed Per Week	(4) Weekly Wages or Earnings	(5) Number of Regular Work Weeks in Period*
J. H. Berger	4/21/42-9/4/42	48	40.00	16
	9/5/42-4/20/43	48	45.00	33
	4/21/43-12/10/43	48	50.00	35
Rodriguez	4/21/42-9/5/42	48	30.00	19
	9/6/42-1/25/43	46	30.00	16

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8. That as of October 24, 1938, and for the weekly periods immediately prior to the effective date of the Fair Labor Standards Act of 1938, the regular weekly hours and weekly wages of the plaintiffs then employed at 149 Madison Avenue, were as follows:

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

130 *Plaintiffs' Exhibit 2*

Plaintiff's Name	Regular Weekly Hours	Weekly Wages
George Anderson	48	23.00
Frank Asselta	60	23.00
Camilo Del Rio	48	23.00
Joseph McArdle	48	23.00
Samuel Manne	48	23.00
Burton Peterson	48	23.00
James Torra	48	28.00

9. That as of April 20, 1942, and for the weekly pe-
131 riods immediately prior to the effective date of the said National War Labor Board Agreement, the regular weekly hours and weekly wages of the plaintiffs then employed at 149 Madison Avenue, were as follows:

Plaintiff's Name	Regular Weekly Hours	Weekly Wages
George Anderson	47	25.00
Camilo Del Rio	47	25.00
Samuel Manne	47	25.00
Cornelius McCole	60	25.00
Burton Peterson	47	25.00
Frank Rodriguez	47	30.00
132 James Torra	47	28.00
J. H. Berger	48	40.00

10. That each plaintiff, for the period April 21, 1942 to December 10, 1943, signed the employer's weekly pay roll for each week of his employment during said period, opposite the horizontal column showing his hours worked and wages paid therefor under the following legend: "Received amount as stated in column marked 'Total Compensation' in full for all services rendered as of this date." Attached hereto marked Exhibit A and
4 made a part hereof, is a photostatic copy of a pay roll for the week beginning January 3, 1943 and ending Jan-

Plaintiffs' Exhibit 2 133

uary 9, 1943, which is typical of the employer's pay roll for prior and subsequent periods.

11. That in the negotiations leading to said National War Labor Board Agreement, it was agreed in substance between the Negotiating Committees of the Union and the employers that the wages and hourly rates agreed upon for any agreement succeeding the said Sloan Agreement would be retroactive to April 21, 1942.

12. That upon the trial of this action, defendants may introduce in evidence copies of the Sloan Agreement, the National War Labor Board Agreement, the National 134
War Labor Board's Directive Order dated July 29, 1942, and the Report and Recommendations of the Mediation Panel of said Board in Case No. 141 between Realty Advisory Board on Labor Relations and Building Service Employees International Union Local 32-B, subject to any objections which the plaintiffs may make as to the materiality and relevancy of such documents.

Dated: November 22, 1944.

SAMUEL D. FRIEDMAN
Attorney for Plaintiffs
JOSEPH CAINE
Attorney for Defendants 135

136 **Plaintiffs' Exhibit 3.**

Sloan Agreement.

(Omitted pursuant to stipulation.)

Plaintiffs' Exhibit 4.

National War Labor Board's Directive Order.

137 (Omitted pursuant to stipulation.)

Plaintiffs' Exhibit 5.

Computation sheets for additional wages for period October 24, 1938, to April 20, 1942.

(Omitted pursuant to stipulation.)

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138 **Plaintiffs' Exhibit 6.**

Weekly pay roll records for period April 20, 1942, to December 10, 1943.

(Omitted pursuant to stipulation.)

Defendants' Exhibit B. 139

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER, Plaintiffs, against 149 MADISON AVENUE CORP. and WILLIAMS & Co., Inc., Defendants.	Additional Stipulation of Facts 140

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties as follows:

1. That this stipulation shall supplement the testimony and Exhibits received upon the trial of this action and shall be marked in evidence as defendants' Exhibit "B."

2. That throughout the period succeeding September 141
5, 1942, the situations referred to in the following subdivisions hereof were taken care of in the manner therein severally set forth as follows:

(a) When during any workweek an employee was absent for part of that workweek because of "sickness, or other excusable causes" and therefore actually worked less hours than regularly scheduled, he was paid for those hours which would, but for those excusable absences, have exceeded 40 hours, at the rate of time and one-half the hourly rate as computed under the National War Labor Board agreement hereinafter in this paragraph 2 referred to as "the contract." Thus, an employee reg-

142 *Defendants' Exhibit B*

ularly scheduled to work 46 hours during the workweek who was absent for illness for two days (or 16 hours) was shown on the payrolls as working 24 hours of straight time for a compensation of 24 times the hourly rate as computed in the contract and six hours of overtime for a compensation of six times one and one-half times the hourly rate as computed in the contract. This was done pursuant to Sub-Division 5 (i) of Section III (Page 29 of Plaintiffs' Exhibit 1). For example, see Plaintiffs' Exhibit "6," payroll of Peterson, December 13 to De-
143 cember 19, 1942.

(b) When during any workweek an employee was absent for part of that workweek for an inexcusable cause and therefore actually worked less hours than regularly scheduled, he was paid for the number of hours actually worked on the basis of regular time, *i. e.*, at the hourly rate as computed in the contract, except for hours actually worked in excess of 40 hours in which latter event he would be paid for such excess hours at the rate of one and one-half times the hourly rate as computed in the contract. Thus, an employee regularly scheduled to work 46 hours during the workweek who was
144 absent three days (or 23 hours) for inexcusable cause was shown on the payrolls as working 23 hours and receiving compensation therefor at the rate of 23 times the hourly rate as computed in the contract. For example, see Plaintiffs' Exhibit "6," payroll of Peterson for February 28 to March 6 ,1943.

(c) Absences shown for the following employees during the following periods were "inexcusable":

Del Rio	7/ 4/43—7/10/43
Peterson	2/28/43—3/ 6/43
	6/ 6/43—6/12/43
	6/20/43—6/26/43
	8/ 1/43—8/ 7/43

(d) Holidays not worked but paid for were treated as time worked in computing overtime hours under the National War Labor Board Agreement. Holidays not worked, which are indicated by the symbol "HD," are not shown as hours worked, but the employee is credited with those number of hours which normally and except for the holiday would have been designated as overtime hours and paid therefor at the rate of one and one-half times the hourly rate as computed in the contract. Thus, an employee who did not work but was paid for a holiday (8 hours) is shown as working 38 hours and receiving compensation therefor at 40 times the hourly 146
rate as computed in the contract and six times one and one-half times the hourly rate as computed in the contract. For example, see Plaintiffs' Exhibit "6," payroll for November 22 to November 28, 1942.

3. That the plaintiffs J. H. Berger and Frank Rodriguez throughout the period succeeding September 5, 1942, were paid for hours between 40 per week and their regular workweek at the rate of time and one-half the hourly rate as computed pursuant to paragraph 7 of Plaintiffs' Exhibit "2" as amended in paragraph 5 hereof and for hours in excess of their regular workweek time and three-quarters the hourly rate as computed 147
pursuant to paragraph 7 of Plaintiffs' Exhibit "2" as amended in paragraph 5 hereof and were also paid in accordance with the practices referred to in paragraph 2 of this stipulation.

4. That paragraph 5 of Plaintiffs' Exhibit "2" be amended to read as follows:

> "That the said plaintiffs enumerated in paragraph 1 were employed and actually worked pursuant to the terms of said National War Labor Board Agreement during the periods specified below on the following basis:

148 *Defendants' Exhibit B*

(1) Plaintiff's Name	(2) Period	(3) Total Hours Regularly Employed Per Week	(4) Weekly Wages or Earnings	(5) Number of Regular Work Weeks in Period*
Del Rio	4/21/42-8/ 8/42	47	$27.50	13
149	8/10/42-4/20/43	46	27.50	31
	4/21/43-12/11/43	46	28.90	30
Manne	4/21/42-8/ 8/42	47	27.50	15
	8/10/42-4/20/43	46	27.50	34
	4/21/43-12/11/43	46	28.90	31
McCole	4/21/42-6/13/42	60	27.50	8
150	6/15/42-8/ 8/42	59	27.50	7
	8/10/42-4/20/43	54	27.50	36
	4/21/43-12/11/43	54	28.90	32
Peterson	4/21/42-8/ 8/42	47	27.50	15

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

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(1)	(2)	(3)	(4)	(5)
Plaintiff's Name	Period	Total Hours Regularly Employed Per Week	Weekly Wages or Earnings	Number of Regular Work Weeks in Period*
	8/10/42-4/20/43	46	27.50	29
	4/21/43-8/ 7/43	46	28.90	11
Torra	4/21/42-8/ 8/42	47	30.50	15
	8/10/42-4/20/43	46	30.50	32
	4/21/43-12/11/43	46	31.90	29"

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5. That paragraph 7 of Plaintiffs' Exhibit "2" be amended to read as follows:

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"That the plaintiffs, J. H. Berger and Frank Rodriguez, for the period of their employment subsequent to April 21, 1942, were employed and actually worked on the basis of the following regular work weeks and weekly wages, and they agreed with their employer that their hourly rates for said employment would be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of 40 hours:

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

154 *Defendants' Exhibit B*

(1) Plaintiff's Name	(2) Period	(3) Total Hours Regularly Employed Per Week	(4) Weekly Wages or Earnings	(5) Number of Regular Work Weeks in Period*
Berger, J. H.	4/21/42-9/12/42	48	$40.00	18
	9/14/42-3/20/43	48	45.00	23
155	3/21/43-12/11/43	48	50.00	36
Rodriguez	4/21/42-8/ 8/42	48	30.00	14
	8/10/42-1/25/43	46	30.00	21"

6. That it is the intention and expectation of the parties that if the plaintiffs are entitled to recover for any part of the period for which suit is brought, the amount of such recovery will become the subject of a stipulation; 156 if and to the extent that such stipulation be not made, then each of the parties reserves the right, subject to the acceptance thereof by the Court, to submit their computations to the Court upon the final submission of the controversy.

7. This stipulation is not intended to supersede the exhibits which have been marked in evidence, except in so far as plaintiffs' Exhibit 2 has been amended by this stipulation. In the event of any contradiction between

*This column represents the number of weeks in the specified period for each plaintiff during which he worked the regular work week as set forth in the third column, and excludes weeks during which plaintiffs worked 40 hours or less.

this stipulation and the other exhibits marked in evidence, except as above referred to, and except that the schedules set forth in paragraph 4 hereof reflects for the specified periods weekly earnings on the basis of certain retroactive adjustments that were made pursuant to Article VIII, page 12, of the National War Labor Board agreement, the other exhibits shall prevail. Moreover, this stipulation is not intended to preclude either party from showing errors in calculation or otherwise, if any, on specific payrolls (Plaintiffs' Exhibit 6).

Dated: New York, January 2, 1945. 158

SAMUEL D. FRIEDMAN
Attorney for Plaintiffs
JOSEPH CAINE
Attorney for Defendants.

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160 **Findings of Fact and Conclusions of Law.**

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This cause having been tried and the court having heard the evidence and considered the stipulations of the parties, finds the facts and states the conclusions of law as follows:

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Findings of Fact

1. At all the times throughout the period between April 21, 1942 and December 10, 1943 each of the plaintiffs was a resident of the City and State of New York.

2. At all the times throughout the period between April 21, 1942 and December 10, 1943 the defendant 149 Madison Avenue Corp. was a domestic corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 149 Madison Avenue, in the City, County
162 and State of New York.

3. At all the times throughout the period between April 21, 1942 and December 10, 1943 the defendant Williams & Co., Inc. was a domestic corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 1178 Broadway, in the City, County and State of New York.

4. At all the times throughout the period between April 21, 1942 and December 10, 1943, the defendant 149 Madison Avenue Corp. owned and controlled the loft

building located at and known as 149 Madison Avenue, New York, N. Y.

5. At all the times throughout the period between April 21, 1942, and December 10, 1943, the defendant William & Co., Inc., acted as the agent of and for the account of the defendant 149 Madison Avenue Corp. in the management and operation of the building known as and located at 149 Madison Avenue, New York, N. Y., had full authority to hire and fire employees engaged in the operation and maintenance of the said building, and issued instructions to and otherwise controlled, directed, managed and super- 164
vised the maintenance employees of the said building including the plaintiffs herein in the performance of their duties.

6. At all the times throughout the periods hereinbelow specified with respect to the plaintiffs severally, each of the plantiffs was employed by the defendants as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., and performed all his duties as such service employee at the said building:

Camilo Del Rio	April 21, 1942 to Dec. 10, 1943	
Samuel Manne	April 21, 1942 to Dec. 10, 1943	165
Cornelius McCole	April 24, 1942 to Nov. 20, 1943	
Burton Peterson	April 21, 1942 to July 31, 1943	
Frank Rodriguez	April 21, 1942 to Jan. 23, 1943	
James Torra	April 21, 1942 to Dec. 10, 1943	
John H. Berger	April 21, 1942 to Dec. 10, 1943	

7. At all the times throughout the period between April 24, 1942, and December 10, 1943, the building known as and located at 149 Madison Avenue, New York, N. Y., consisted of 12 floors comprising 7,700 sq. ft. each and a basement whose rentable portion comprised 3,850 sq. ft.

166 *Findings of Fact and Conclusions of Law*

8. At all the times throughout the period between April 21, 1942, and December 10, 1943, the total rentable area of the building known as and located at 149 Madison Avenue, New York, N. Y., comprised 96,250 sq. ft.

9. At all the times throughout the period between April 21, 1942, and December 10, 1943, the actually rented area of the building known as and located at 149 Madison Avenue, New York, N. Y., was 86,500 sq. ft.

10. At all the times throughout the period between April
167 21, 1942, and December 10, 1943, a substantial amount of the rentable area of the building known as and located at 149 Madison Avenue, New York, N. Y., was occupied by tenants in the production of goods for commerce among the several States and to places outside the State of New York.

11. Each of the plaintiffs, at all the times of his employment as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., was engaged therein in the production of goods for interstate commerce or in conduct necessary to the production of goods for interstate commerce.

168 12. In the period succeeding April 20, 1942, the plaintiffs Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra and John H. Berger each worked in his employment as a service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., for hours in excess of 40 hours a week.

13. The plaintiffs whose workweeks during the period succeeding April 20, 1942, exceeded 40 hours did not receive compensation for such excess hours at rates equal to at least 1 1/2 times the regular hourly rates at which they were employed.

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14. The plaintiffs Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra and John H. Berger were paid for the period succeeding April 20, 1942, pursuant to the terms and practices of an agreement (operating retroactively from September 5, 1942) between the Realty Advisory Board on Labor Relations, Inc., a voluntary and not an official organization, and Local 32-B of the Building Service Employees International Union of which all the said plaintiffs except Frank Rodriguez and John H. Berger were members.

15. For their employment periods which succeeded April 20, 1942, the said plaintiffs were employed by the defendants at fixed weekly rates of compensation. 170

16. The agreement pursuant to which the said plaintiffs were paid for the period succeeding April 20, 1942, contained the following provision:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

17. The agreement formula for determining the hourly rates of those employees who were regularly employed more than 40 hours per week did not correctly calculate or determine the true hourly rates of their employment. 171

18. The agreement formula for determining the hourly rates of those employees who were regularly employed more than forty (40) hours per week was designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way.

19. The purpose of the agreement formula for determining the hourly rates of those employees who were regularly employed more than 40 hours per week was to re-

172 *Findings of Fact and Conclusions of Law*

duce the hourly rate sufficiently so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement.

20. The agreement formula was not strictly followed. During certain weeks between April 21, 1942, and December 10, 1943, while a plaintiff's agreed regular workweek and weekly wage remained unchanged, the number of hours over 40 actually worked by him differed from the number of hours over 40 in his regular workweek. In
173 such situations, under the agreement formula the hourly rates should have fluctuated from week to week in accordance with the variations of overtime worked. In fact they did not so vary, but remained the same from week to week as if the plaintiff actually worked only the regular workweek.

21. For their several employment periods which succeeded April 20, 1942, the excess, above the compensation actually received, which the several plaintiffs were entitled to receive if the hours worked in excess of 40 per week had been compensated at the rate of 1 1/2 times their several regular hourly rates, was as follows:

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Camilo Del Rio	April 21, 1942 to Sept. 5, 1942	$33.05
	Sept. 5, 1942 to Dec. 10, 1943	87.96
Samuel Manne	April 21, 1942 to Sept. 5, 1942	$39.41
	Sept. 5, 1942 to Dec. 10, 1943	85.86
Cornelius McCole	Apr. 21, 1942 to Sept. 5, 1942	$72.60
	Sept. 5, 1942 to Nov. 20, 1943	164.78
Burton Peterson	Apr. 21, 1942 to Sept. 5, 1942	$33.91
	Sept. 5, 1942 to July 31, 1943	62.43
Frank Rodriguez	Apr. 21, 1942 to Sept. 5, 1942	$38.90
	Sept. 5, 1942 to Jan. 23, 1943	31.33
James Torra	Apr. 21, 1942 to Sept. 5, 1942	$41.52
	Sept. 5, 1942 to Dec. 10, 1943	102.31
John H. Berger	Apr. 21, 1942 to Sept. 5, 1942	$55.45
	Sept. 5, 1942 to Dec. 10, 1943	199.94

22. The fair and reasonable value of the services rendered by the attorneys for the plaintiffs in the preparation and litigation of so much of their several causes of action as pertained to the employment periods succeeding April 20, 1942, is 25% of the total recovery of each plaintiff, computed as follows:

Names of Plaintiffs	Amount of Recovery as Additional Compensation	Amount of Recovery as Liquidated Damages	Plaintiffs' Total Recovery	Attorneys' Fees
Camilo Del Rio	$121.01	$121.01	$242.02	$ 60.50
Samuel Manne	125.27	125.27	250.54	62.63
Cornelius McCole	237.38	237.38	474.76	118.69
Burton Peterson	96.34	96.34	192.68	48.17
Frank Rodriguez	70.23	70.23	140.46	35.11
James Torra	143.83	143.83	287.66	71.91
John H. Berger	255.39	255.39	510.78	127.69

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Conclusions of Law.

1. Jurisdiction is conferred on this Court by 28 U. S. C. A., Section 41(8), and by 29 U. S. C. A., Sections 207, 216(b), also known as the Fair Labor Standards Act of 1938.

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2. Each plaintiff, throughout his employment period as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., was engaged in the production of goods for commerce among the several states and to places outside the State of New York within the purview of the Fair Labor Standards Act of 1938.

3. The Fair Labor Standards Act of 1938 was applicable to the employment of each of the plaintiffs as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y.

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4. With respect to the employment of each of the plaintiffs as a maintenance or service employee of the building known as and located at 149 Madison Avenue, New York, N. Y., each of the defendants was and acted as the employer within the purview of the Fair Labor Standards Act of 1938 and, in particular, within the purview of Section 3(d) of the Act.

5. Each of the plaintiffs who worked in his said employment for the defendants during the period after April 20, 1942, is entitled to recover from the defendants both
179 for additional compensation arising out of the defendants' failure to have compensated him for overtime hours at the rate of at least 1 1/2 times the regular rate at which he had been employed and, in addition thereto, in an equal amount as liquidated damages, plus attorneys' fees and the costs of the action, pursuant to the provisions of the Fair Labor Standards Act of 1938, Secs. 7 and 16(b).

6. This action is brought to recover upon a liability created by statute, other than a statutory penalty or forfeiture, and the only statute of limitations which is applicable to such a suit is the six-year statute set forth in Civil Practice Act, Sec. 48(2).

180 7. Each and all of the defenses interposed by the defendants are dismissed and stricken out.

8. Plaintiffs' attorneys are entitled to attorneys' fees in the amount of 25% of the total amount recovered by each plaintiff.

9. The plaintiffs are entitled to judgment as follows:

Names of Plaintiffs	Total Amount of Recovery (Exclusive of attorneys' fees)	Attorneys' Fees	Total Amount
Camilo Del Rio	$242.02	$ 60.50	$302.52
Samuel Manne	250.54	62.63	313.17
Cornelius McCole	474.76	118.69	593.45
Burton Peterson	192.68	48.17	240.85
Frank Rodriguez	140.46	35.11	175.57
James Torra	287.66	71.91	359.57
John H. Berger	510.78	127.69	638.47

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10. Plaintiffs shall have the costs and disbursements of this action.

Dated, New York, February 28th, 1946.

WM. BONDY,
United States District Judge.

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184 **Opinion by Bondy, J.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Samuel D. Friedman, Esq., By Frederick E. Weinberg, Esq., for Plaintiffs.

Joseph Caine, Esq., By Moses M. Cohen, Esq., For 149 Madison Avenue Corp.

185 Messrs. McLanahan, Merritt & Ingraham, By Robert R. Bruce, Esq., For Williams & Co., Inc.

BONDY, District Judge:

This action was brought by maintenance employees in a building owned by the defendant, 149 Madison Avenue Corp. and operated by the defendant, Williams & Co., Inc., to recover unpaid overtime compensation, liquidated damages and a reasonable attorney's fee pursuant to Secs. 7 and 16(b) of the Fair Labor Standards Act of 1938, 29 U. S. C. A. Secs. 207, 216(b).

The building consists of a basement and 12 floors, each 186 covering 7700 square feet. Of the basement, only 3850 square feet are rentable. The total rentable area of the building is 96,250 square feet.

Maintenance employees of a building in which at least 20 per cent of the rentable area is devoted to production of goods for interstate commerce are to be regarded as engaged in an occupation necessary to the production of goods for commerce and are covered by the Act. Baldwin v. Emigrant Industrial Savings Bank, 150 F. (2d) 524, 525, certiorari denied November 13, 1945; Fleming v. Post, 146 F. (2d) 441, 443; Gangi v. D. A. Schulte, 150 F. (2d) 694, 696. See Kirschbaum Co. v. Walling, 316 U. S. 517; Walling v. Jacksonville Paper Co., 317 U. S. 564, 572.

A tenant is engaged in production of goods for interstate commerce if at least 20 per cent of his activity is directed on the premises to the production of such goods, Fleming v. Post, *supra,* which authority is deemed binding on this court. Under Sec. 3(j) of the Act, 29 U. S. C. A., Sec. 203(j), handling of goods incidental to their preparation for shipment in interstate commerce is sufficient to constitute production thereof. Baldwin v. Emigrant Industrial Savings Bank, *supra;* Fleming v. Post, *supra.* See Western Union v. Lenroot, 323 U. S. 490, 503.

Testimony was given as to the extent of occupancy and the nature of the business of only five out of about twenty 188
tenants.

Lawrence Fertig & Co. were engaged in creating on the premises advertising material for their clients. They shipped from the premises at least 1,750 engraving plates of the advertisements per month for use in publications outside the state. This constituted more than 50 per cent of the business they conducted on the premises and yielded more than 50 per cent of their revenue. Gehring Laces, Inc., was a wholesale jobber of laces and embroideries which were manufactured for it elsewhere and delivered at the premises. From 25 to 30 per cent of its revenue of over $1,000,000 each year was derived from goods shipped 189
from the premises to places outside the state. Oliver & Kaufman converted goods on the premises and shipped them to places outside of the state to the extent of about 75 per cent of their billings. Each of these tenants occupied a floor, or together 23,100 square feet, amounting to 24 per cent of the rentable space. At least 20 per cent of the activities of each of these consisted in handling goods for interstate commerce on the premises. The plaintiffs accordingly are covered by the Act. This is so without the inclusion of the Dell Publishing Company which did on the premises all the preliminary and creative work for its publications but none of the printing or purely me-

chanical work. It shipped therefrom only a comparatively small number of complimentary copies to advertisers and others at special request, amounting at most to 1/10th of one per cent of all copies of its publications. This is also exclusive of the Atlanta Knitting Mills, which maintained only their executive offices at Madison Avenue, but carried on all their manufacturing at a mill in Catskill, New York, from which all shipments were made to points outside of New York City. The goods of these tenants were produced elsewhere without any manufacturing or substantial handling on the premises. Cf. 10 East 40th Street
191 Building, Inc., v. Callus, 325 U. S. 578.

It is not essential that the plaintiffs prove their damages with mathematical precision. Caperna v. Williams-Bauer Corp., 184 Misc. 192, cited with approval in De Pasquale v. Williams-Bauer Corp., 151 F. (2d) 578, 579. For the period from October 24, 1938, to April 20, 1942, the overtime worked by plaintiffs was based on computations made by an accountant from the pay rolls of the defendant, Williams & Co., Inc., and audited by the Wage and Hour Division. The maintenance manager of Williams & Co. testified that only infrequently were unworked hours not noted on the pay rolls. Compensation based on these
192 computations was subsequently paid by the defendants to the plaintiffs in exchange for receipts and general releases.

The record does not disclose that there was any dispute of any kind culminating in the payments of overtime compensation for this period. There accordingly was not any accord and satisfaction of the plaintiffs' claims for liquidated damages equal to such compensation. Fleming v. Post, *supra*; Rigopoulos v. Kervan, 140 F. (2d) 506. Nor do the releases constitute a bar or waiver of any right to recover such liquidated damages under the provisions of Sec. 16(b) of the Act. O'Neill v. Brooklyn Savings Bank, 293 N. Y. 666, affirmed 324 U. S. 697; Fleming v. Post, *supra*. See Gangi v. D. A. Schulte, *supra*.

The acceptance by the employees of a belated payment of overtime wages does not preclude recovery of liquidated damages, the right thereto being mandatory. Rigopoulos v. Kervan, *supra*. Nor were these claims barred by the New York three-year statute of limitations relating to actions on statutory penalties or forfeitures. (C.P.A. Sec. 49, subd. 3.) An action under the Fair Labor Standards Act is not an action on a penalty but on a liability created by statute, to which the six-year statute is applicable. (C.P.A. Sec. 48, subd. 2); Walsh v. 515 Madison Avenue Corp., 181 Misc. 219, affirmed 267 App. Div. 756, affirmed 293 N. Y. 826. 194
The liquidated damages constitute additional compensation and not a penalty or punishment. Overnight Motor Co. v. Missel, 316 U. S. 572, 583.

It does not appear definitely on what date before October 1, 1939 Gehring Laces, Inc. occupied any part of the building. Consequently, so far as the record discloses, before October 1, 1939 the tenants engaged in the production of goods for interstate commerce occupied less than 20 per cent. of the rentable area.

Plaintiffs accordingly are entitled to recover liquidated damages in an amount equal to overtime compensation paid to them for the period between October 1, 1939 and 195
April 20, 1942.

Defendants contend that from April 21, 1942 to the time of the service of the complaint, December 10, 1943, during which time defendants kept records of actual hours worked weekly by the plaintiffs, they paid overtime at one and one-half times the hourly rates computed according to a formula contained in an agreement between the Realty Advisory Board on Labor Relations, Inc., a voluntary and not an official organization, and Local 32B of the Building Service Employees International Union, of which most of the plaintiffs were members.

The formula provided: "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The agreement provided a weekly rate for a regular workweek in excess of forty hours and an hourly rate to be derived from such weekly rate by dividing the weekly wage by the number of hours worked plus one-half
197 of the hours actually worked over forty and not by only the number of hours actually worked during the week. This formula was "designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way." Its purpose was "to reduce the hourly rate sufficiently, so the payment of time and a half for overtime * * * will not bring the total weekly earnings substantially above the weekly rates set by the Agreement." (Report of the Mediation Panel of the National War Labor Board p. 70, pursuant to whose recommendations the agreement was promulgated.) In practice the formula was not strictly followed. Between April 21, 1942 and December 10, 1943 the hourly rates
198 were changed by recourse to the prescribed formula only when the regular workweek or the weekly earnings changed, whereas, if the formula had been adhered to, the hourly rates would have fluctuated from week to week in accordance with the variations of overtime worked, regardless of whether or not weekly earnings changed.

Having fixed a weekly wage by agreement, the determination of the regular rate became "a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." Walling v. Hardwood Co., 325 U. S. 419, 425. The hourly rates derived by the use of the formula bore no relation to the regular rate of the workweek as

defined in Overnight Motor Co. v. Missel, *supra*. They therefore were ineffective to establish plaintiffs' hourly ordinary time and overtime rates and plaintiffs are entitled to payment of overtime and liquidated damages in accordance with Secs. 7(a) and 16(b) of the Act, 29 U.S.C.A. Secs. 207(a), 216(b). See Watkins v. Hudson Coal Co., 151 F. (2d) 311.

The situation in Walling v. Belo Corp., 316 U. S. 624, is clearly distinguishable since there the contracts provided for an hourly rate and not, as here, for a weekly rate to be reduced to an hourly rate by dividing it by 200
hours in excess of those actually worked during the week.

The fact that defendants here actually applied in all situations the hourly rates so derived does not validate such rates. The manner in which the hourly rate is determined and not the application of an hourly rate is the test. Walling v. Helmerich & Payne, 323 U. S. 37, 42; Walling v. Harnischfeger Corp., 325 U. S. 427; Walling v. Hardwood Co., *supra*; Walling v. Uhlmann Grain Co., 151 F. (2d) 381.

Williams & Co., Inc. acted as the agent of the defendant, 149 Madison Avenue Corp., in the management and operation of the building and had authority to hire and 201
fire employees engaged in its maintenance. The defendant Williams & Co., Inc. is therefore not in a position to urge a dismissal of the complaint as to it on the ground that there was no evidence of its relation to the plaintiffs or the issues. An agent who acts in the interest of an employer in relation to an employee is liable as an "employer" for sums owed by the owners. 29 U.S.C.A. Sec. 203(d); Greenberg v. Arsenal Building Corp., 144 F. (2d) 292.

As has been stipulated, the parties should agree upon the amount of recovery for the period April 21, 1942 to December 10, 1943 in accordance with this opinion.

202 *Opinion by Bondy, J.*

or in the absence of such agreement, both sides should submit proper computations. The amount of the attorney's fee will be determined upon the settlement of the findings.

December 31, 1945.

WM. BONDY
United States District Judge.

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Judgment Appealed From.

DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

[Same Title.]

The issues in the above entitled action having regularly been brought on for trial before Hon. William Bondy, U. S. District Judge, at a term of this Court appointed to be held for the trial of civil actions on November 16, 17, 20, 21, 22 and 24, 1944, and the parties hereto having appeared by counsel, and the issues having been duly tried upon the proofs submitted on behalf of the respective parties, and the Court having duly rendered its decision and opinion in writing dated December 31, 1945, and having made its findings of fact and conclusions of law in writing on February 28th, 1946, and directing that judgment be entered in favor of the plaintiffs against the defendants 149 Madison Avenue Corp. and Williams & Co., Inc., and that attorneys' fees pursuant to Section 16B of the Fair Labor Standards Act be allowed in the sum of $524.70 and costs and disbursements as taxed,

Now, on motion of Samuel D. Friedman, attorney for the plaintiffs, it is

Adjudged that the following named plaintiffs do recover from the defendants, 149 Madison Avenue Corp., having its principal place of business at 149 Madison Avenue, in the Borough of Manhattan, City and State of New York, and Williams & Co., Inc., having its principal place of business at 1178 Broadway, in the Borough of Manhattan, City and State of New York, the respective sums set opposite their names as follows:

208 *Judgment Appealed From*

Name	Amount
Camilo Del Rio	$ 242.02
Samuel Manne	250.54
Cornelius McCole	474.76
Burton Peterson	192.68
Frank Rodriguez	140.46
James Torra	287.66
John H. Berger	510.78
Total	$2,098.90

209 and it is further

ADJUDGED that the plaintiffs Camilo Del Rio, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriquez, James Torra, John H. Berger, do recover of the defendants 149 Madison Avenue Corp. and Williams & Co., Inc. the costs and disbursements as taxed by the Clerk of this Court in the sum of $554.18, together with the sum of $2,098.90 aforesaid, amounting to $2,653.08, and that the plaintiffs have execution therefor.

Approved this 6th day of March, 1946.

WM. BONDY
210 *U. S. D. J.*

Judgment rendered:

WILLIAM V. CONNELL
Clerk

March 8th, 1946.

Defendants' Notice of Appeal.

211

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sirs:

NOTICE IS HEREBY GIVEN, that 149 Madison Avenue Corp. and Williams & Co., Inc., the defendants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit, from the final judgment entered in this 212 action on March 8, 1946, and from each and every part of said judgment.

Dated, New York, N. Y., March 18, 1946.

Yours, etc.

JOSEPH CAINE
Attorney for Defendants
Office & P. O. Address
1178 Broadway
Borough of Manhattan
New York, N. Y.

To: 213

WILLIAM V. CONNELL,
Clerk of the United States District Court
for the Southern District of New York.

DUBERSTEIN & NIMKOFF, Esqs.,
Attorneys for Plaintiffs
450 Seventh Avenue
New York, N. Y.

214 **Stipulation After Trial and Decision.**

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

WHEREAS the District Court, by opinion dated December 31, 1945, has rendered a decision after trial wherein the claims of the plaintiffs against the defendants have been found and stated to be valid in certain respects
215 and to be invalid in certain other respects; and

WHEREAS the parties hereto desire legally to create a position wherein part of the matters decided by the said District Court shall be accepted as final and deemed henceforth to have been conclusively determined while other matters which the District Court decided shall be the basis of appeal; and

WHEREAS it is the desire of the parties hereto to set forth their aforesaid intentions and embody them in an agreement to the end of rendering them fixed and legally enforceable,

216 NOW, THEREFORE, the parties agree as follows:

1. Plaintiffs and defendants hereby waive their respective rights to appeal with respect to all issues embracing the period October 24, 1938, to April 20, 1942, without prejudice, however, to plaintiffs' claims for the period succeeding April 20, 1942, and without prejudice to defendants' right to appeal from so much of the decision of the District Court and the judgment to be entered thereon as affects the period succeeding April 20, 1942.

2. Defendants shall pay to plaintiffs on or before February 28, 1946, the following sums representing full payment of liquidated damages for the period from October

1, 1939, to April 20, 1942, all overtime for such period having heretofore been paid:

Plaintiffs	Amount
Frank Asselta	$300.03
Camilo Del Rio	176.66
Joseph McArdle	119.38
Samuel Manne	162.52
Cornelius McCole	234.99
Burton Peterson	172.95
Frank Rodriguez	78.43
James Torra	208.08
John H. Berger	230.11
George Berger	96.28
Total	$1,779.43

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3. Defendants shall pay to plaintiffs on or before February 28, 1946, the sum of $450.00, being the agreed reasonable attorneys' fee for the services in this litigation which related to the period from October 1, 1939, to April 20, 1942.

4. The findings of fact and conclusions of law and the judgment of the District Court shall be limited to matters pertinent to the period of time which succeeded April 20, 1942. 219

5. Neither the payments by defendants and the acceptance by the plaintiffs or their attorneys of the amounts referred to in "2" and "3" hereof nor the content or form of the findings of fact, conclusions of law or judgment shall constitute the splitting of causes of action nor otherwise prejudice the rights, powers, privileges or immunities of any of the parties with respect to the period or any part of the period succeeding April 20, 1942.

220 *Stipulation After Trial and Decision*

6. Defendants concede that for the entire period of time subsequent to April 20, 1942, each of the plaintiffs was engaged in the production of goods for interstate commerce at the building known as and located at 149 Madison Avenue, New York, N. Y., and that each of the defendants acted as the employer, both within the meaning of the Fair Labor Standards Act of 1938, and the defendants agree that the District Court may so find and that such findings are proper and shall be and remain conclusive.

221 7. It is agreed that the defendants may appeal from so much of the judgment as adjudicates a liability against them for the period, or for any part of the period, succeeding April 20, 1942, except that it is agreed that the defendants may not challenge or appeal from so much of the judgment as determines the applicability of the Fair Labor Standards Act of 1938 to the employment of the plaintiffs.

8. It is agreed that the proposed findings of fact and conclusions of law shall be submitted to the District Court by each of the parties on the 25th day of February, 1946.

9. It is agreed that, on the appeal of the defendants
222 to the Circuit Court of Appeals, Second Circuit, from the judgment to be entered in the District Court, the notice of appeal, record on appeal and the brief to be submitted by the defendants shall be filed by them on or before 45 days after service of the judgment with notice of entry thereof upon the attorneys for the defendants, and that the plaintiffs will file and serve their brief within 30 days after the record and the brief of defendants is filed, and that thereafter neither party shall move or otherwise seek or apply for any adjournment or postponement of the argument or submission of the appeal in the Circuit Court of Appeals, Second Circuit.

If the attorneys for either of the parties, by reason of unusual circumstances, are unable to prepare the case on appeal or file the record or briefs, then the foregoing schedule shall be amended to the extent thus necessitated.

10. With respect to the plaintiff, Anderson, who died pending this action and as to whom the action was discontinued at the trial on that account, defendants agree to pay his legal representative any sums due, in all respects as though he were included as a plaintiff herein, upon presentation to the defendants' attorneys of satisfactory authority and releases. 224

11. The parties hereto agree that the proposed findings of fact and conclusions of law which will be submitted by each to the District Court shall be in conformance with the terms of this stipulation insofar as it is relevant. Neither party will propose any finding of fact or conclusion of law with respect to any matter which is not pertinent to the period succeeding April 20, 1942.

12. The defendants will make no claim nor seek to recover from nor offset against the plaintiffs any part of the monies hereto paid to them by the defendants for overtime compensation covering the period October 24, 1938, to October 1, 1939. 225

13. This stipulation shall be filed with the District Court as part of the record in this case, concurrently with the submission to the Court of the proposed findings of fact and conclusions of law.

Dated: New York, February 21, 1946.

SAMUEL D. FRIEDMAN,
Attorney for Plaintiffs.
JOSEPH CAINE,
Attorney for Defendants.

226 **Stipulation Withdrawing Objections to Amendments to Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the objection which the defendants made at the trial to the amendments
227 to the complaint are withdrawn for the purposes of the appeal and that the defendants will not claim that the decision of the Trial Court, which allowed such amendments to be made, was improper. Upon the basis of this stipulation, portions of the stenographic minutes of what took place at the trial which bear upon the propriety or impropriety of the amendments to the complaint are omitted from the record on appeal.

Dated: New York, N. Y., April 2, 1946.

DUBERSTEIN & NIMKOFF,
Attorneys for Plaintiffs.

228 JOSEPH CAINE,
Attorney for Defendants.

Stipulation re Designation of Portions of Record to be Contained in the Record on Appeal. 229

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The parties hereto, by their respective attorneys, stipulate and agree that the record on the appeal of the defendant from the judgment of this Court rendered the 8th day of March, 1946, shall be constituted of the portions of the record, proceedings and evidence in the case 230
as set out hereinbelow, said portions of the record, proceedings and evidence being designated as the record on appeal.

1. Statement under Rule 13, Subdivision 4.

2. Summons and amended complaint.

3. Amended answer.

4. Portions of minutes of trial, before Hon. William Bondy, United States District Judge, on

5. Stipulation herein between plaintiffs and defendants, dated April 2, 1946, stipulating that plaintiffs' exhibits 231
numbered 1, 3, 4, 5 and 6 be omitted from the transcript of record on appeal.

6. Plaintiffs' exhibit numbered 2 and defendants' exhibit B.

7. Findings of fact and conclusions of law, Hon. William Bondy, United States District Judge, dated February 28, 1946.

8. Opinion, Hon. William Bondy, United States District Judge, dated December 31, 1945.

232 *Stipulation re Designation of Portions of Record to be Contained in the Record on Appeal*

9. Judgment, rendered March 8, 1946.

10. Notice of appeal, filed March 26, 1946.

11. Stipulation, dated February 21, 1946.

12. Stipulation, dated April 2, 1946.

13. Designation of portions of record to be contained in the record on appeal—stipulation.

Dated: New York, N. Y., April 2, 1946.

233

DUBERSTEIN & NIMKOFF,
Attorneys for Plaintiffs.

JOSEPH CAINE,
Attorney for Defendants.

234

Stipulation. 235

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, April // , 1946. 236

DUBERSTEIN & NIMKOFF,
Attorneys for Plaintiffs-Appellees.

JOSEPH CAINE,
Attorney for Defendants-Appellants.

237

238 **Clerk's Certificate.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of the said District Court
239 in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, this 22 day of April, in the year of our Lord one thousand nine hundred and forty-six, and of the independence of the said United States the one hundred and seventieth.

WILLIAM V. CONNELL,
Clerk.

(Seal.)

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[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 307

Argued May 13, 1946. Decided June 17, 1946

Docket No. 20237

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger and George Berger, Plaintiffs-Appellees,

against

149 MADISON AVENUE CORP. AND WILLIAMS & CO., INC., Defendants-Appellants

Before Chase, Clark and Frank, Circuit Judges.

Appeal from a Judgment of the District Court for the Southern District of New York. Affirmed

Duberstein & Ni nkoff, Attorneys for Plaintiffs-Appellees; Wilbur Duberstein and Frederick E. Weinberg, of Counsel.

Joseph Caine, Attorney for Defendants-Appellants; Walter Gordon Merritt, Robert R. Bruce, and John J. Boyle, of Counsel.

[fol. 82] Per CURIAM:

The appellees and others not parties to this appeal brought this suit in the District Court for the Southern District of New York to recover overtime pay, liquidated damages and a reasonable attorney's fee under §7(a) and §16(b) of the Fair Labor Standards Act, 29 U. S. C. A. §§207(a) and 216(b). It was brought against the owner and the managing agent of a loft building in the City of New York in which the plaintiffs worked as maintenance employees and it has been stipulated that they were engaged in the production of goods for commerce. It originally covered periods both preceding and subsequent to April 20, 1942, but all questions concerning the preceding period have now been adjusted and settled and the sole issue on this appeal is whether the method for the calcu-

lation of overtime pay incorporated in the contract of employment under which the appellees worked after April 20, 1942 conforms to the requirements of the Act. Before April 20, 1942 the appellees were employed to work fixed workweeks exceeding forty hours at fixed weekly wages. Those weekly wages were sufficiently high in each instance so that the hourly rate computed, in what may be called the usual way shown by *Overnight Motor Transportation Co., Inc.* v. *Missel*, 316 U. S. 572, by dividing the amount received by the number of hours worked would amount to more than the statutory minimum. They were also sufficiently high so that the regular hourly rate would exceed the statutory minimum if computed in accordance with a formula which was inserted in a contract of employment covering these employees effective as of September 1, 1942, for the future until April 20, 1945, and made retroactive to April 21, 1942. This formula, sometimes called that of the National War Labor Board Agreement, provided so far as now material, that:

> [fol. 83] "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

In making the employment contract of September 1, 1942, the parties did not see fit to agree upon the basis of a designated regular hourly rate of pay for a statutory workweek expressed simply in terms of dollars or cents but retained the previous workweek in excess of forty hours and the previous weekly wage which the appellees had been paid, and subject to future changes in both the workweek and the weekly wage, attempted to bring the agreement within the statute by means of the formula above quoted. The appellants seek to justify this seemingly cumbersome method for compliance with the statute on the ground that the parties understood that the stated weekly wage included what statutory overtime was inherent in the stated workweek. Consequently, so it is argued, it must follow, since the appellees agreed to allocate their weekly wages in accordance with the formula that for the first forty hours their hourly rate would be sufficiently

low (not being less than the statutory minimum) to permit an increase of 50 per cent for the hours in the designated workweek in excess of forty without increasing their weekly pay rate. It is said that, because by the use of the formula such an allocation of the weekly pay may be made by mathematical computation, the contract should be treated as though for each employee an hourly rate so computed had been expressly stated. See, *Bergschneider* v. *Peabody Coal Co.*, Cir. 7, 142 F. (2) 784; *Shepler* v. *Crucible Fuel Co.*, Cir. 3, 140 F. (2) 371.

[fol. 84] In the absence of any attempt to circumvent the statute we might agree. But here the court found on substantial evidence that the appellees were employed by the appellants after April 20, 1942, at fixed weekly rates of compensation and that the "purpose of the agreement formula for determining the hourly rates of those employees who were regularly employed more than 40 hours per week was to reduce the hourly rate sufficiently so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement." The effect of the use of the formula was to make any increase in the employees pay above the regular weekly rate depend not upon overtime in excess of forty hours but upon overtime computed only in excess of whatever workweek the parties might agree upon. As was demonstrated in this record, that involved mathematical computations which in most instances would if the formula was strictly adhered to, not result in the exact weekly pay agreed upon. The slight discrepancies were then simply ignored and the agreed weekly rate was always paid instead of what would be due under the formula. The result was employment at whatever regular workweek and at whatever regular weekly wage the parties saw fit to agree upon which remained constant regardless of work in excess of forty hours per week which was not in excess of the number of hours in the agreed workweek. While the parties were free to agree upon any regular workweek and fix or compute the regular rate of payment therefore in any way they desired provided the statutory minimum hourly wage was paid, *United States* v. *Rosenwasser*, 323 U. S. 360, "this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37,

[fol. 85] 42. It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek. See *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U. S. 419, *Adams* v. *Union Dime Sav. Bank*, Cir 2, 144 F. (2) 290; *Watkins v. Hudson Coal Co.*, Cir. 3, 151 F. (2d) 311. The attempt to make the contract consummated in September retroactive to April 20 but highlights the illusion that the new contract was more than a continuation of the old wage arrangement which did not comply with the statute. The right to overtime pay which had already accrued to these appellees could not thus be waived. *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697.

Affirmed.

[fol. 86] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of June one thousand nine hundred and forty-six.

Present: Hon. Harrie B. Chase, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

FRANK ASSELTA, et al., Plaintiffs-Appellees,

v.

149 MADISON AVENUE CORP., and another, Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 87] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Frank Asselta, et al., v. 149 Madison Ave. Corp., and ano. Judgment, United States Circuit Court of Appeals, Second Circuit. Filed June 17, 1946, A. M. Bell, Clerk.

[fol. 88] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 87, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

FRANK ASSELTA, et al., Plaintiffs-Appellees,

against

149 MADISON AVENUE CORP., and another, Defendants-Appellants

as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of July, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventieth.

Alexander M. Bell, Clerk. (Seal.)

[fol. 89] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 497

ORDER ALLOWING CERTIORARI—Filed December 9, 1946

A petition for rehearing having been submitted in this case,

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari enterer October 28, 1946, be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted. The case is transferred to the summary docket and assigned for argument immediately following No. 564, which case is assigned for argument immediately following No. 74.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.